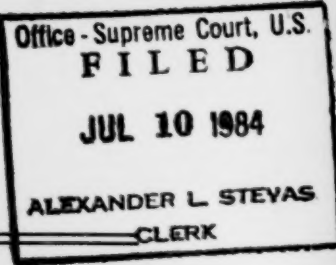


84-80



No. ....

In The  
**Supreme Court of the United States**  
October Term 1983

— o —  
VIRGINIA T. HANZLIK,

*Petitioner,*

vs.

FREDERICK F. PAUSTIAN,

*Respondent.*

— o —  
**ON WRIT OF CERTIORARI TO  
THE SUPREME COURT OF THE  
STATE OF NEBRASKA**

— o —  
**PETITION FOR A WRIT OF CERTIORARI**

— o —  
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## QUESTIONS OF LAW PRESENTED FOR REVIEW

- A) Whether a decision of the court of last resort of any state is a law within the meaning and prohibition of the Fourteenth (14th) Amendment to the Constitution of the United States.
- B) Whether a decision of such court, by declaring a matter of undisputed evidence to be competent, for the drawing of a favorable inference, for one party and incompetent for the other party, for any purpose; violates the prohibitions against the abridgement of the privileges and immunities of U.S. citizens, or deprives them of due process or equal protection of the laws.
- C) Whether the court of last resort of any state may grant summary judgment grounded on evidence it simultaneously declares incompetent *idem per idem*, without violating the rights, privileges and immunities of the unsuccessful party, guaranteed by the Fourteenth (14th) Amendment to the Constitution of the United States.
- D) Whether a palpably inequitable decision of summary judgment by a court of last resort is a denial of the right to petition the "Government" within the meaning of the First Amendment to the Constitution of the United States.

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**CITATION OF THE REPORTED OPINION  
WHICH IS SOUGHT TO BE REVIEWED**

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The opinion of the Supreme Court of the State of Nebraska, which by this petition is sought to be reviewed is reported as: *Hanzlik v. Paustian*; and reported at:

216 Neb. 575, 344 NW2d 649.

The judgment of the Supreme Court of the State of Nebraska was dated and entered on February 24, 1984; and the date and entry of the order denying rehearing was April 11, 1984.

## JURISDICTIONAL STATEMENT

The granting of the writ of certiorari to the Supreme Court of the State of Nebraska, is being sought pursuant to RSC 17.1(c) and 28 USC 2101(c).

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions which this case on petition involves are:

- A) "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Fourteenth (14th) Amendment to the Constitution of the United States*, Sec. 1.
  - B) "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." *First Amendment to the Constitution of the United States*.
  - C) "*Rule 701. Opinion testimony by lay witnesses.* If the witness is not testifying as an expert, his testimony in the form of opinion or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." *Reissue Revised Statutes of Nebraska*, 1943, Sec. 27-701.
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## STATEMENT OF THE CASE

The action in question is one of alleged medical malpractice, wherein plaintiff suffered permanent disfigurement of body as a result of an avoidable open chest surgical procedure to save her life which was imminently threatened by infection resulting from a ruptured esophagus that had received no treatment for at least four days prior to surgery, and was, on the contrary, subjected to continued and increased dilation by the defendant doctor, contrary to standards of locally accepted medical procedure as admitted by the defendant doctor in sworn deposition and affidavit.

On appeal to the Supreme Court of Nebraska for an order granting defendant a summary judgment, the crucial evidence was an affidavit by plaintiff's counsel that summarized pertinent evidence and demonstrated the inferences or opinions available from the undisputed record. That affidavit had been admitted in the trial court without objection and remained unanswered either by the defendant or his counsel throughout the hearings below or on appeal, either orally or in defendant's counsel's brief. The affidavit stated: ". . . the common medical abbreviations for 'with', 'without' and 'no' are:  $\bar{c}$  (*cum*),  $\bar{s}$  (*sans*) and *no*. That the local common medical abbreviation for degree is 'o'. That the notation  $\bar{o}$  is the notation degree (o) with a vinculum (-) superimposed (a common math/science abbreviation) indicating a bond or inseparable connection." All of the foregoing, except the combination of 'o' and (-) appeared in the glossary of "Standard Ab-

breviations and Symbols" that was also received as evidence without objection or contradiction by the defendant. The glossary was patently a medical one. In addition to the glossary, plaintiff's affidavit quoted the pertinent daily medical hospital charts of the plaintiff, which were either signed or approved by signature of the defendant.

The defendant had testified by deposition that dilation procedures would be immediately terminated on evidence of complete perforation of plaintiff's esophagus. Further, he testified that a "distinctive sign" of perforation was subcutaneous emphysema. This indicated a complete as opposed to a confined perforation, which did not involve the entire wall of the esophagus.

On *August 22, 1974*, it was noted of record. "o subcut. emphysema".

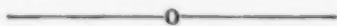
The Nebraska Supreme Court in its opinion at p. 651 (NW2d), made the following observation: "However, an esophagram study, a barium x-ray to determine any possible disruption of the integrity of the esophageal wall, was carried out on *August 23*, following dilation. This indicated a mucosal irregularity as of a *superficial* tear, but disclosed *no evidence* of any compromise of the integrity of the wall of the esophagus." (emphasis supplied)

That same report, however, in fact noted: "Esophagram → o shown perforation."

Thus the Nebraska court either draws a contrary or contradictory conclusion with that of the plaintiff's attorney's affidavit, ignoring the evidence of the 22nd—the day before.



But that court then declared: "statements in affidavits as to opinion, belief, or conclusions of law are of no effect. The same is true of summaries of facts or arguments . . . *which would be inadmissible* in evidence." The court then went on to declare plaintiff's evidence as incompetent, ignoring the rules of evidence pertaining to evidence of lay witnesses, as provided by legislative enactment; and granted summary judgment to the doctor.



### **MANNER AND METHOD OF RAISING THE FEDERAL QUESTIONS**

The federal questions sought to be reviewed were first raised in plaintiff's Motion and Brief for Rehearing, at p. 4, as Proposition of Law no. X. The First Amendment was quoted in pertinent part, as hereinbefore, and the Fourteenth Amendment was quoted verbatim. Both were argued briefly, as follows, at p. 13 of the Motion:

"Granting the Defendant an inference that does not exist by misinterpreting medical evidence (as opposed to drawing legitimate inferences) based on evidence competent for the court's purposes but incompetent ('source of glossary unknown') for the litigants' purposes; and denying Plaintiff any and all reasonable probative value of the undisputed record, glossary, and admission of the Defendant-Expert: is an abuse of process and a denial of basic right and equality to this Plaintiff, contrary to the clear and express provisions of the Constitution of the United States. . . ."

The Nebraska Supreme Court, without opinion or comment, overruled the motion for rehearing by journal

entry on the 11th day of April, 1984: "Motion of appellant for rehearing overruled."

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## ARGUMENT

A writ of certiorari to the Supreme Court of the State of Nebraska should be granted for the reasons that (a) the extension of citizens' rights and the prohibition of their abridgement to include actions taken by the several states, cannot have been meant to be applied to anything less than the whole of state government, including the courts; and (b) to deny a litigant by a palpably inequitable summary judgment the right to present a genuine issue of fact to the jury, is a denial and an abridgement of the right to petition 'the Government' for a redress of grievances.

It cannot reasonably be said that "the Government", whether of the United States or of any of the several states, includes this or that—but not the courts.

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## CONCLUSION

To fail to find that the Fourteenth (14th) Amendment extends to decisions of the state courts of last resort, and which are palpably inequitable; or that the provisions of the First Amendment through the application of the Fourteenth (14th) also extend to the same degree; is to fail to

give critical and necessary admonition to offending lower courts, of their duty and oath of office and the sanctity of the most basic and primary principle of law of our federal Republic: Equal Justice Before The Law.

Respectfully submitted,

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